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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Opinions Below

The memorandum and order of the Hon. Jack B. Weinstein, District Judge (E.D.N.Y.), dated April 23, 1969 which denied the defendants' motion to join the Depart-

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* This suit was originally entitled *National Welfare Rights Organization, et al.* v. *Wyman, et al.* That organization, lacking standing to sue, was stricken as a party plaintiff by order of the District Court dated April 23, 1969 (Document No. 17 of the Index of the original Record on Appeal in the Court of Appeals).

ment of Health, Education and Welfare as a necessary party defendant is set forth in "Appendix to Petition for Certiorari, Motion to Expedite and Jurisdictional Statement", Nos. 1539 and 1540, O.T. 1968, submitted by petitioners to this Court last term (1a).** The memorandum and order of the Hon. Jack B. Weinstein, District Judge, dated April 23, 1969 striking the National Welfare Rights Organization as a party plaintiff is not in issue herein. It is Document No. 17 in the original record on appeal in the Court of Appeals. The memorandum and order of the Hon. Jack B. Weinstein, District Judge, dated April 24, 1969 convening a three-judge court and issuing a temporary restraining order is set forth at 4a. The memorandum and order of the three-judge District Court dated May 12, 1969 dissolving itself is set forth at 10a. The opinion in support of the issuance of a preliminary injunction by the Hon. Jack B. Weinstein, District Judge, dated May 15, 1969 is set forth at 14a. The opinion and order of the Hon. Jack B. Weinstein, District Judge, granting plaintiffs' motion for summary judgment is set forth in an appendix to the petition for certiorari at 39aa.* The order of this Court dismissing petitioners' appeal from the dissolution of the three-judge court and refusing to grant certiorari before judgment is found at 37 U.S.L.W. 3492. The opinion and order of the United States Court of Appeals for the Second Circuit dated July 16, 1969 vacating the preliminary and permanent injunctions, reversing summary judgment and affirming dissolution of the three-judge court is set forth at 45aa. The opinion of Mr. Justice Harlan referring petitioners' application for interim relief to the full Court has not been published.

** References to the aforementioned appendix are designated "—a".

* Numbers followed by "aa" refer to the appendix to the instant petition.

Jurisdiction

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1254(1), 2101(c) and (f).

Questions Presented

1. Did the District Court have jurisdiction over the validity of the New York statute based on its asserted non-conformity with 42 U.S.C. § 602(a)(23) where no plaintiff's anticipated reduction in welfare payments approached $10,000 and no deprivation of any civil right of the plaintiffs was asserted?

2. Did New York comply with 42 U.S.C. § 602(a)(23) by increasing its standard of need for welfare recipients to fully reflect increases in the cost of living?

3. Would the alleged non-compliance with the Social Security Act, governing federal grants in aid to the states, warrant a declaration of invalidity of a state statute which establishes levels of welfare payments?

Statutes Involved

The pertinent provisions of the Social Security Act (28 U.S.C. § 602[a][23]) and of the New York State Social Services Law § 131-a (Chapter 184 L. 1969 and Chapter 411 L. 1969) are set forth in the petition at pp. 5-9.

Statement of the Case

Proceedings Below

The instant action was brought by petitioners to invalidate a new section of the Social Services Law of New York State governing the levels of public assistance which was

enacted by the New York State Legislature on March 31, 1969 to take effect on July 1, 1969. The purpose of the suit and effect of the preliminary and permanent injunctions issued by Judge Weinstein was to force the State to revert to its earlier administratively set levels and methods of payment which had been established pursuant to § 131. Two challenges to the statute were made—first, that the new statute allegedly did not comply with 42 U.S.C. § 602(a)(23), a section of the Social Security Act governing the eligibility of states for grants in aid for dependent children, and secondly, that the new statute in establishing higher levels of payments to recipients within New York City than those outside the city constituted a denial of equal protection.

The case was brought on by an order to show cause signed by Judge Weinstein and served on respondents on April 10, 1969 returnable before the same Judge on April 15, 1969. On that day without conceding the substantiality of the federal question, respondents moved to convene a three-judge court pursuant to 28 U.S.C. § 2281. On April 21, respondents moved to join the Secretary of Health, Education and Welfare as an additional party defendant pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. On April 23, 1969 the District Judge denied the latter motion and on April 24 he issued a temporary restraining order and granted respondents' motion to convene a statutory three-judge court (4a ff). Both sides moved for summary judgment and the three-judge court (Moore, C.J., Mishler, D.J. and Weinstein, D.J.) heard argument on May 2, 1969.

On that same day the Legislature passed an amendment to subdivision 4 of § 131-a which was signed by the Governor on May 9, 1969. The new section permits the Commissioner of Social Services to raise the levels of payment in any county to that paid to New York City recipients

and authorizes the Board of Supervisors of any county to request such an increase* (Pet. p. 9).

By order dated May 12, 1969 that Court dissolved itself on the ground that the constitutional issue had become mooted by the amendment to § 131-a (10a ff). Judge Weinstein promptly issued another temporary restraining order, this one enjoining enforcement of the statute, despite the uncontroverted showing by plaintiffs that suspension of § 131-a might require the State to pay out $10,000,000 each month more than the amount payable pursuant to § 131-a—an amount completely irretrievable once disbursed (Tr., April 23, 1969, pp. 124-125).

On May 15, 1969 Judge Weinstein issued his preliminary injunction against enforcement of the statute (14a ff). That decision, although ostensibly granting a preliminary injunction, in fact ruled against the validity of the state statute in every important respect and effectively nullified it, stopping just short of an express order to that effect. Judge Weinstein held that § 602(a)(23) was not a narrow statute but one of revolutionary proportions which effectively "precludes" New York from changing its existing welfare program.

The District Judge found "a number of independent bases for concluding that jurisdiction exists" over plaintiffs' claims (16a) and held it "clear that at the time the three-judge court was convened jurisdiction existed pur-

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* Petitioners suggest that respondents sought passage of this amendment in order to moot the instant litigation (Pet. p. 14). This contention has repeatedly been made orally and has consistently been denied by respondents. Since it was the motion of respondents that convened the three-judge court for the reasons for which 28 U.S.C. § 2281 was originally enacted—to protect a state from having a statute declared unconstitutional by one District Judge chosen by plaintiffs—it was not in the interest of respondents to moot the constitutional claim and cause the dissolution of the three-judge court. In fact, it was petitioners' political representatives who wrought the legislative changes.

suant to [28 U.S.C. § 1343(3) and 42 U.S.C. §§ 1983, 1988]" (17a). He then found that when the constitutional issue was mooted and the three-judge court which had jurisdiction over it was dissolved, there still existed pendent jurisdiction over the statutory claim (16a-20a).

The District Judge also claimed jurisdiction under 28 U.S.C. § 1331, even though that section requires that "the matter in controversy exceeds the sum or value of $10,000." He acknowledged that the claims of individual petitioners may not be aggregated to satisfy that statute, *Snyder v. Harris*, 394 U. S. 332, *reh. den.* 394 U. S. 1025, and that none of the anticipated reductions of any of the petitioners approached $10,000 (22a). But he used § 1331 as a basis for jurisdiction through the novel suggestion that "indirect damage" to the plaintiffs could occur if reductions in their welfare grants caused malnutrition so severe as to retard "their children's physical and mental development" (22a).

Having found jurisdiction to review New York's legislation, the District Court construed § 602(a)(23) as deserving a "broader construction than that given by the Department of Health, Education and Welfare." He held that it required every state to increase the level of welfare payment (51a). Furthermore, he read the changes in New York's Welfare Law as a diminution of its standard of assistance (38a-42a).

On May 21, 1969 the Court of Appeals granted respondents' motion for preference for their appeal and denied the motion for a stay of the preliminary injunction without prejudice to renewal at the time of argument. The appeal was argued on June 4, 1969 and on June 11 the Court of Appeals stayed the injunction pending the disposition of the appeal.

The next day Judge Weinstein informed the parties that the material referred to in his May 16 opinion

must be produced by Monday, June 16, 1969 and that the parties appear before him on Wednesday, June 18 for a hearing on the motions for summary judgment. On June 16 the Court of Appeals denied petitioners' motion to vacate the stay and also denied respondents' motion to stay proceedings in the District Court pending disposition of the appeal from the preliminary injunction.

On June 17 petitioners appealed to this Court from the order of dissolution of the three-judge court. They also sought a writ of certiorari before judgment and a motion to expedite. On June 18, while appeals were pending before this Court and before the United States Court of Appeals for the Second Circuit, the District Court granted summary judgment for petitioners and issued a permanent injunction. On that day respondents filed a notice of appeal to the Court of Appeals. On June 19 the Court of Appeals granted respondents' motions to stay the permanent injunction and to consolidate the appeal from the permanent injunction with the appeal from the temporary injunction on the original briefs.

On June 24 this Court dismissed the appeal from the dissolution of the three-judge court for want of jurisdiction indicating that it was properly appealable to the Court of Appeals. This Court also refused to grant certiorari before judgment and denied the motions to expedite review and vacate the stays. 37 U.S.L.W. 3492. Petitioners thereafter appealed to the United States Court of Appeals from the order dissolving the three-judge court and that appeal was also consolidated before the United States Court of Appeals.

On July 16, the Court of Appeals rendered its decision, reversing the temporary and permanent injunctions and affirming the dissolution of the three-judge court.

New York AFDC Program

One of the errors underlying the instant cause of action is the assumption that the Social Security Act sets up a national program for aid to dependent children and that aid to dependent children in New York is a federal program administered by the State. Actually, the individual states have set up 50 diverse programs and they each have applied for federal contributions which are dispersed, as a practical matter, at higher rates the lower the State's level of assistance (App. 128a [Exh. M], 187a-188a).* 42 U.S.C. §§ 601-603.

Welfare in New York long preceded the Social Security Act of 1935 and the State program has always outpaced federal requirements. Indeed, the rate of assistance provided by the Congress in the District of Columbia ($184 per month for a family of four) is far lower than that provided by New York ($278 per month for a family of four) (App. 128a [Exh. C]). The State Board of Social Welfare was established in 1927. New York's Public Welfare Law of 1929 changed the emphasis in welfare legislation from institutional care to providing for care of the needy in their own homes. It was the model for the federal program, rather than the creature of it. This is not past history. New York still pays the highest level of benefits per AFDC recipient in the country and spends the most money per capita population on aid to dependent children (App. 140a [Exh. H, I]).

For decades New York has mandated public welfare officials, "insofar as funds are available for that purpose, to provide adequately for those unable to maintain them-

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* The reference "App. —a" refers to the appendix submitted by respondents in the United States Court of Appeals for the Second Circuit. Pages 128a and 140a of that appendix each contain a number of exhibits which had been annexed to an affidavit submitted in support of respondents' motion for summary judgment. These exhibits are differentiated by reference to their exhibit number, as for example, "Exh. M" in the above citation.

selves" and to determine the adequacy of assistance provided "in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities" (Social Services Law § 131 [1, 3]). Pursuant to this statutory standard, the New York State Department of Social Services has established items of basic need and levels of payment administratively and, from year to year, conducted cost-of-living surveys and adjusted such standards and levels in accordance therewith. 18 N.Y.C.R.R. § 352.4. Thus in August, 1968, the Department, employing United States Bureau of Labor Statistics cost-of-living figures, as well as its own statistical material based on its actual pricing of items throughout the State, readjusted the schedule of grants (App. 114a-115a, 128a [Exh. A]).

The resultant standard of need was calculated and the State divided into three areas, with standards varying by a few dollars per month depending on utility costs. Monthly cash allowances, exclusive of rent and fuel for heating (which are added separately to each recipient's payment), were calculated based on the number of persons in the family and the age of the oldest child, computed in two-year intervals (App. 115a, 118a, 128a [Exh. B, F]). Thus, in the area denominated "SA-1" (New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties), a family of four received an allowance ranging from $152.00 where the oldest child was five or under to $221.00 where the oldest child was sixteen or over.

The 1969 Legislature in enacting § 131-a made three substantial changes in New York's public assistance program.* It set levels of payment legislatively, rather than

* Section 131a and its predecessor, § 131, deal with levels of assistance for all public assistance recipients, not just for aid to families with dependent children who are, however, the majority of all welfare recipients in the State (886,860 of 1,210,601 welfare recipients in 1968 [App. 125a]). In New York City 657,089 received AFDC relief out of a total of 889,262 welfare recipients.

administratively; it averaged the age of the oldest child, thus eliminating age differentials in determining the level of aid to each size family and it eliminated the special grant procedure. However, all of these important changes are based on the 1968 revised standard of need. There was no arbitrary lowering of prices of components or elimination of items from that standard.

Legislative, as opposed to administrative, enactment of public assistance levels in New York was necessary because the magnitude of the welfare appropriation. The proposed budget for 1969-70 contained $1,170,000,000 for welfare out of a total budget of $6,147,000,000. $321,125,000 was earmarked for AFDC. Executive Budget, pages m8, m19, 786 (Record on Appeal to Court of Appeals Document No. 48). The number of AFDC recipients has been sky-rocketing. In New York City, the number went from 360,000 to 600,000 between January, 1966 and July, 1968 (App. 128a [Exh. L]). In the State as a whole, the number increased from 763,000 in 1967-68 to 917,000 in 1968-69 and is projected to increase to 1,096,000 in 1969-70 (Executive Budget, *supra*, p. 779). In this period of increasing numbers and increasing standard of living, it is to be expected that the Legislature would wish to schedule the payments itself, in order to more efficiently plan its budget.

The elimination of age differentials and special grants greatly simplified New York's program of assistance. This simplification had been suggested by the Department of Health, Education and Welfare to all the states as early as February 5, 1964 (App. 228a-231a). It was also proposed by the State Department in its 1968 report to the Governor concerning the revamping of the Welfare Law in order to stop the vicious cycle of poverty that has seemed to envelop its recipients (App. 232a-236a).

The age differential that had been used to determine the level of assistance to each family was frequently the cause

of administrative delay in increasing the family's benefits as the oldest child reached a new level. It also created inequities since some families might have mostly young children and one older child and some families have children of a moderate age clustered together. The Department never determined the age of each recipient for purposes of determining its standard of need, but used the age of the oldest child and assumed that each of the other children was progressively two years younger.

Section 131-a eliminated that differential and provided a specific amount depending only on the number of children in the family. This amount was computed on the basis of the 1968 standard of need and the 1968 figures on the age of families actually receiving welfare. The mean age of children in families participating in the AFDC program was calculated in a chart (App. 118a-121a, 128a [Exh. E, F]) which indicated that, for example, in a family of four the mean age of oldest child was 10.09 years (App. 128a [Exh. E, F]), so that the average monthly allowance (again exclusive of rent and fuel) received by AFDC families after the adoption of the August, 1968 cost of living adjustment was $191.00. The amount provided in 1968 for a family of each size in cases where its oldest child was of that mean age was then adopted as the standard allowance for that size family. Where the mean age contained a fraction the older age was used. To this sum was added $17.00—the amount necessary to bring the allowance up to $3,535.00, the federal annual subsistence level for New York City for a family of four (App. 118a-119a, 128a [Exh. F]), or a monthly allowance of $208.00 plus heat and fuel for heating as actually paid. The allowance for the remainder of the state was determined at a differential of $25.00 for a family of four (App. 119a). A new amendment to § 131-a permits the other welfare districts to be increased to the New York City level if the cost-of-living figures so dictate. As the computations of the Department show, these levels, based on the previous allowance including the cost-of-living in-

creases of 1968, will result in slightly increased benefits to families with younger children and slightly decreased benefits to those with older children (App. 120a-121a).

The method chosen by New York to eliminate age differentials was that suggested by the Department of HEW (App. 229a):

> "For example, if the family of 3 in a given State is most frequently composed of an adult, a child of 7 to 12 and a child of 13 to 18 use the food cost figures best suited to those ages, as they appear in the U. S. Department of Agriculture publication . . ."

The third change involved the elimination of "special grants" which is not related to the standard of need at all. Those grants are defined in 18 N.Y.C.R.R. § 352.5. They were for non-recurring expenditures and only given when necessity was shown. They were not regularly available as the level of assistance.

Again HEW specifically suggested the abolition of special grants (App. 230a-231a):

> "The practical problem in the effective use of the special need items is the lack of equity that results because of the variations among workers in knowledge, attitudes, and even available time, together with the variations among recipients in knowledge of what they can ask for. The net effect is that in some States certain recipients' needs are fairly substantially met, whereas others may receive only the minimum amounts.
>
> "Perhaps a more equitable, liberal (for total caseload), and simple method is to have realistic money amounts in the standard of requirements for basic needs without the individualization of special needs. A differentiation can be made for different living arrangements, such as variations in costs for room and board, restaurant meals, or nursing home care."

It must be recognized that there existed a wide disparity in the real levels of welfare payments throughout the state (App. 120a). The special grant system militated heavily in favor of the more aggressive or sophisticated welfare recipient. The size and frequency of special grants varied enormously according to locality and according to the vagaries of individual caseworkers and welfare administrators as well as the assiduousness with which such special grants were requested by recipients. This approach was rejected as outmoded and unfair by every serious commentator in the field, and specifically condemned by the Department of HEW (App. 228a-231a). The Legislature had a right to consider these criticisms of the existing system of administratively established levels of special grants and to substitute therefor a flat-grant approach which would eliminate disparities in actual benefits received due to factors unrelated to need.

The New York standard of need includes, as we have shown, rent, which is a major component although not encompassed in the § 131-a schedule, since it varies with the amounts actually paid by each family. It is undisputed that rents have increased during the period 1968-1969 (App. 121a). These substantial increases in rent—13% in New York City in the past three years—represent an increase in the standard of need and in the actual level of payment to welfare recipients in New York over and above the levels set in § 131-a. In addition, many items previously provided by special grants are being provided by the Department of Social Services on a "purchase of services" basis (App. 121a; Tr. April 23, 1969, pp. 158-60). This means that the Social Services Department directly pays for a service such as moving, homemaking, etc. where there is special need.

The Federal Program

New York, like every state, receives federal funds through the AFDC and other programs administered by the United States Department of Health, Education and Welfare (herein "HEW") under the Social Security Act (42 U.S.C. §§ 601, *et seq.*).* This program, established in 1935, provides certain minimal requirements which the States must meet in order to be eligible for participation therein. Although § 601 requires the Secretary of HEW to approve state plans, there is no federal regulation which governs the amount a State must pay to its recipients. This is dramatically demonstrated by the chart showing the enormous disparity in sums actually paid by the various states under their AFDC programs—ranging from $71.75 per average recipient in New York, through $58.25 in New Jersey (the next highest State) to $8.50 in Mississippi (App. 140a [Exh. I]). The legislative history of the Social Security Act (S. Rep. 628, 74th Cong., First Sess. 4 [1935]) candidly notes that "[l]ess Federal control is provided than in any recent Federal aid law." As this Court noted in *King* v. *Smith*, 392 U. S. 309, 318-319, "each State is free to set its own standard of need and to determine the levels of benefits by the amount of funds it devotes to the program."

In 1968 Congress added to § 602(a) the provision on which this suit was based. That sub-section provides:

> "(23) [The States shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established and any maximums that the State imposes

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* Social Security Act sections will be referred to herein as § 601, § 602, etc., their numbers in 42 U.S.C. Section 601 is also known as § 401 of the Social Security Act; § 602 is § 402, etc.

on the amount of aid paid to families will have been proportionately adjusted."

The bill originally introduced by HEW (H.R. 5510, 90th Cong., 1st Sess.) which emerged as § 602(a)(23) contained requirements that all states, by July 1, 1969, pay a benefit equivalent to their full standard of need, which many states now fall short of doing. In fact 28 states pay less than their own professed standard of need (App. 128a [Exh. C].* The bill also required each state to review its standards annually. As enacted, however, § 602(a)(23) is a statute with modest objectives which must be construed strictly in light of its language, its legislative history, and the nature of the system of which it is a small part.

The primary clause requires an updating of the standard of needs. The standard of need is the prerequisite for the states to receive federal funds under the Social Security Act. It comprises the amounts that are necessary for a family to live at subsistence level in that state. It does not govern the level of payments made by the state. The standard of need determines eligibility for welfare in the various states. Thus, an expansion of the standard of need expands the number of people eligible for welfare. However, it does not in any way affect the level of payments.

Petitioners place reliance on the secondary clause of sub-section 23 dealing with requirement of a proportional adjustment in "any maximums . . . paid to families." The Court below properly held that this clause did not apply to New York at all since it has no maximum on the amount paid to families (58a-59a). The Court below cited

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* In Alabama the standard of need for an AFDC family of four, including rent, is $177.00 but the actual amount paid is only $89.00. And in Missouri, the standard of need of $305.00 exceeds New York's, but the actual amount paid is only $124.00, while New York pays its full standard of need—$278.00. Mississippi pays $55.00 (128a [Exh. C]).

the authoritative interpretation of § 602(a) (23) by the Department of Health, Education and Welfare which is found in its *amicus curiae* brief (App. 187a-227a) submitted in the Louisiana case of *Lampton* v. *Bonin*, —— F. Supp. —— (E.D.L.A. Civ. No. 68-2092-E, 1969).

HEW relies heavily on the legislative history of subsection 23 in demonstrating the Congress meant it to have only a modest result (App. 199a-200a, 212a-216a). The elimination of the requirement that states pay their full standard of need actually cut the heart out of the proposal. When that is combined with the elimination of annual updating of the standard of need it is clear that the statute on which petitioners rely cannot be interpreted to have the revolutionary effect on the federal program which they advocate.

Three external factors also support this interpretation. As Judge Hays indicated, Congress attached no importance whatsoever to its passage (59a-61a). Furthermore, there was no appropriation authorized to cover the bill despite the fact that the original proposal carried a $60,000,000 appropriation. Furthermore, the dissent in the Senate illustrates that § 602(a) (23) had as its supporters those who favored a limited welfare program and as its opponents those who favored a broader welfare program. Originally, when the Senate bill provided for annual updating, the dissent consisted of Senators Bennett, Curtis, Holland, Stennis, Thurmond and Williams (Delaware). When the House version emerged from the conference committee, those Senators were in the majority approving the bill, and the dissent consisted of Senators Brooke, Case, Harris, Hart, Javits, Kennedy (Massachusetts), Kennedy (New York), Metcalf, Mondale, Nelson, Proxmire, Tydings, Williams (New Jersey), and Yarborough.

Contemporaneously in Congress limitations on, rather than expansion of, welfare expenditure were in the ascendant. In 1968, it enacted subsection (d) to 42 U.S.C. § 603.

This has been called the "welfare freeze" because it withdraws federal funds from any state to the extent that there is an increase in the number of AFDC recipients relative to the total population after January 1, 1969. Yet, by requiring higher standard of need by July 1, 1969, Congress expected a corresponding increase in the number of people eligible for AFDC aid.

Thus, petitioners' suit is placed in its proper perspective. It seeks to overrule a change in the level of assistance by a State which provides a relatively high level of assistance to welfare recipients. It seeks to use as its lever a section passed by a Congress which restricted, rather than expanded, levels of assistance as an addition to a program which was never federal in character.

Reasons for Denying Certiorari

1. The decision below was clearly correct.

There is wholly lacking any substantial basis for petitioners' claim. The basic reason for this Court to refuse certiorari is that the decision of the Court of Appeals was clearly correct and beyond plausible challenge. That decision turned largely on a finding that the District Court lacked jurisdiction to hear the case. The majority decision is written by Judge Hays. Chief Judge Lumbard differs with the opinion in a very limited respect. Judge Feinberg dissents on reasoning directly parallel to Judge Weinstein's. Despite this apparent split in opinion, Judge Hays' reasoning is convincing. His analysis of all the jurisdictional bases, except for pendent jurisdiction, is concurred in by the Chief Judge and his discussion of 28 U.S.C. §§ 1331 and 1343 is beyond reproach (53a-57a).

Judge Hays and Chief Judge Lumbard dealt with the issue of pendent jurisdiction in the same way and their conclusions are different only in form. Judge Hays holds

that there was no jurisdiction and Chief Judge Lumbard found the exercise of jurisdiction by Judge Weinstein an abuse of discretion. Nonetheless the factors influencing both are the same. Both recognize that the only reason for the joinder of the secondary claim (the differential in payment between New York City and Nassau County) was to confer jurisdiction on the District Court to review the primary statutory claim. This is truly "wagging the jurisdictional dog by his non-jurisdictional tail." See *United States* v. *General Insurance Co.*, 247 F. Supp. 543, 546 (N. D. Cal. 1965). It should be noted that petitioners never sought the convening of a three-judge court nor did they seek adjudication of the equal protection claim at all (Tr. April 18, 1969, pp. 111-14).* Indeed the named petitioners have an internal conflict of interest with regard to the secondary claim. The New York City petitioners benefit from the alleged inequality of which the Nassau County petitioners complain.

Another factor relied on by both Judge Hays and Chief Judge Lumbard is the fact that jurisdiction over the secondary claim existed only in the statutory three-judge court, not in the District Court which sought to exercise jurisdiction pendent to it. When the new statute was passed and the secondary claim became moot, all jurisdiction lapsed. Finally, both Judge Hays and Chief Judge Lumbard relied on the primacy of the administrative agency in the area of compliance with Social Security Act. Both felt that HEW should have an opportunity to utilize its expertise in reviewing New York's new statute.

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* While it is true that subsequent administratively set differentials have recently been declared unconstitutional for recipients of Aid to the Aged, Blind and Disabled (*Rothstein* v. *Wyman*, —— F. Supp. —— [S.D.N.Y. Civ. No. 69-2763, Aug. 4, 1969]), the effect of that holding is to equalize the payments of a relatively few recipients with those to the greater number of New York City residents who receive slightly more. Here, in its statutory cause of action, petitioners sought total invalidation of the levels of public assistance.

Thus, there is no real difference between the two judges on the question of pendent jurisdiction. And they correctly interpreted this Court's decision in *United Mine Workers* v. *Gibbs*, 383 U. S. 715, as supporting respondents' position. In that case this Court expressly stated (383 U. S. at 726-727):

> "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals."

These criteria are particularly relevant here where the primary claim was barred by the Eleventh Amendment, was appended to a mooted secondary claim, and the relief sought was extraordinarily drastic.

2. Since the District Court had no jurisdiction, the allegedly important issues which petitioners seek to raise are not properly before this Court.

It is respondents' position that petitioners' interpretation of 42 U.S.C. § 602(a)(23) is untenable. However, even if petitioners were correct this would not be a proper case for this Court to consider the question. The jurisdictional complications make it impossible for this Court to rule authoritatively on the merits. Parties in other states associated with these petitioners in New York have brought similar suits (e.g., *Lampton* v. *Bonin, supra; Jeffer-*

son v. *Hackney*, —— F. Supp. —— [(N. D. Tex. Civ. No. 3-3012-B-3-3126-B, 1969)]. In these cases the equal protection claims to which the statutory claim is appended might be more substantial and at the very least might not have been moot.

3. New York's program for aid for dependent children fully complies with any reasonable interpretation of 42 U.S.C. § 602(a)(23).

Although Judge Hays found that there was a lack of jurisdiction in the instant case he did examine the merits and found that New York's new statute fully complied with the requirements of § 602(a)(23). Chief Judge Lumbard refused to rule on the merits in light of the jurisdictional disposition of the case, but specifically disavowed the interpretation of the merits found in dissenting Judge Feinberg's opinion (65a). Even if this Court were to believe it could reach the merits of this case it would be inappropriate for it to grant certiorari. It would be ironic for this Court to review New York's AFDC program since this State has long paid 100% of standard of need, and the highest level of benefits per AFDC recipients. Furthermore, the magnitude of the welfare burden which New York independently shoulders is striking. In *Jefferson* v. *Hackney, supra,* the three-judge court in Texas was reviewing the benefits received by 136,000 recipients in the State of Texas. In the instant case the federal Courts have been asked to review appropriations for more than 1,000,000 persons (Executive Budget, *supra,* p. 779). Furthermore, as has been described above, the changes in New York's program do not directly affect the level of assistance which is based on a July, 1968 cost of living increase in full compliance with the requirements of § 602(a)(23).

In order to interpret New York statute as a violation of § 602(a)(23) the latter section must be deemed to have

enacted the most significant welfare law in decades. But, even if that unimportant statute were so inflated, this Court would have to further presume New York's statute invalid in contrast to its familiar rulings to the contrary. E.g., *Ferguson* v. *Skrupa*, 372 U. S. 726; *Olsen* v. *Nebraska*, 313 U. S. 236, 246.

4. Section 602(a)23 is a relatively unimportant subdivision of the Social Security Act which has already expired.

As the Court below found, Section 602(a)23 is not a proper vehicle for invalidating New York's public assistance program. It is not even important enough to justify an authorative interpretation by this Court, since in effect it expired after July 1, 1969. There seems to be no doubt that Congress and the New York State Legislature will be faced in their new sessions with serious proposals to revise their welfare programs. No one is satisfied with the existing situation. Welfare recipients demand more money. They and others demand a federal program. Other interest groups demand alternatives to what they term "handouts". The President has proposed a program which would eliminate any question posed by this case. He advocates that the federal government guarantee a $1,600 annual income to every family of four in the United States. If this program were adopted, the federal floor on welfare which petitioners attempt to infer from § 602(a)(23) would be legislatively provided. The federal government would also undertake the responsibility for meeting that floor. Perhaps the most obvious factor about such a program would be the extent to which New York exceeded the federal minimum. In any event this is an era of metamorphisis in welfare and it would be inappropriate for this Court to take a position on the levels of payment for the first time when the existing scheme is likely to be altered.

5. Congress did not create a role for the judiciary with respect to governing levels of payment by states to recipients of AFDC relief, and there is no necessity for one where the Department of HEW has promptly proceeded administratively under its statutory mandate.

Even if § 131-a were in conflict with § 602(a)23, that statute would not be invalid except as an acceptable plan for receiving AFDC funds from HEW. Petitioners do not raise a claim of constitutional deprivation. The federal AFDC program provides for grants-in-aid. It does not purport to preempt the field of welfare from the states. No one can claim that Congress has sought to occupy this field. Indeed, it has deliberately avoided a national plan for welfare and has refused to establish national standards, although it is a national problem. Obviously the Act does not contemplate a judicial determination of non-compliance.

Grant-in-aid programs, in general, and the AFDC sections of the Social Security Act, in particular, regulate the relationship between the federal agency and the state government and do not directly create justiciable issues between an individual and the state government. This is not a case where there has been extended inaction by the agency. Compare *King* v. *Smith, supra.* The Court of Appeals held that at least in the first instance the administrative agency should assess the complicated factual issues with which the Court below was grappling. See *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U. S. 604, 618. Also see *United States* v. *Western Pacific R. Co.,* 352 U. S. 59; *Crain* v. *Blue Grass Stockyards Co.,* 399 F. 2d 868, 871 (6th Cir. 1968); *United States* v. *Manufacturers Hanover T. Co.,* 240 F. Supp. 867, 882 (S.D.N.Y. 1950).

It is undisputed that HEW has commenced its own administrative proceeding to determine whether § 131-a conforms to the Social Security Act's provisions (App. 130a-138a). It has requested appellants to provide detailed information regarding the statute and, pursuant to 42 U.S.C.

§ 601, must determine whether the statute conforms to federal standards for eligibility to receive federal funds. The Court of Appeals properly held that HEW is the federal administrative agency with primary jurisdiction here and the Courts should defer to its expertise in this area.

Petitioners' claim that the letter to New York State from Mr. Callison of the HEW's regional office indicates completion of the administrative proceeding and constitutes a finding that the New York State statute is invalid (Pet. pp. 17n. 5, 30) is unnecessarily snide and totally incorrect. The letter has been answered and HEW is continuing its investigation in a careful, judicious manner appropriate to the seriousness of the issues. The posture of this case is in sharp contrast to the situation in *King* v. *Smith*, where HEW had for years approved the Alabama regulation which was challenged. Here HEW must for the first time determine itself, irrespective of this litigation, whether § 131-a meets its requirements for eligibility in the federal progam, subject to judicial review. Even in *King* v. *Smith*, this Court expressly noted (392 U. S. at 312, fn. 3) that "we intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts."

We are sure the state would comply, as it always has, with any disposition by HEW which became final. The essential philosophy underlying the Social Security Act reflects a philosophy that the States should have virtually full power over their own welfare programs and a desire on the part of Congress to avoid the full responsibility which a truly federal program would impose. A judicial role in enforcing an existing statute could not cure the fundamental weakness of the statute. In fact the cure might be worse than the disease. It also would involve a severe encroachment on the power of the Legislature into the very heart of its essential prerogative—the control of

the purse strings. The order sought by petitioners would direct the New York Legislature to appropriate more money, not indirectly through the transparent device of naming the Commissioner as defendant as the District Judge held (59a), but directly. This is not a case in which the administrative officer who is the named defendant may lower the amounts available to individual recipients in order to spread existing funds. On the contrary the subject matter of this statute is the levels of payment themselves.

As we have noted, § 602(a)(23) deals principally with standards of need and has only a peripheral effect on levels of payment. In light of the permissive federal system which allows shockingly low levels in some jurisdictions (see *King* v. *Smith*, *supra*, at 319 n. 15), its language must be strictly construed. The diversity by which the federal government determines its level of contribution to the various states is not in any way related to the level of payments and is certainly not designed to produce the highest level. For instance, New York receives the lowest possible Federal contribution, although it pays more per AFDC recipient than any other state.

At the present time there is no floor on welfare payments mandated under the federal statute. Congress has appropriated $184.00 per month for a family of four in the District of Columbia (New York provides $278.00 per month for a family of four (App. 128A [Exh. "C"]). The Bureau of Labor Statistics subsistence level of $3,535 for a family of four is explicitly met by § 131-a (App. 118A-119A, 128A [Exh. "F"]). The only standard New York is accused of failing to meet is its own previous standard. It would constitute an invasion of the legislative power to require the State to nail to its masthead forever whatever scheme happened to be in effect on January 2, 1968. See *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 200-201 (1947).

An interpretation of § 602(a) 23 that would hold New York's substantial level of payments invalid while allowing other states to pay small fractions of New York's amount might, itself, raise a problem of equal protection to New York citizens. This Court must deal even-handedly with citizens of all states. Yet petitioners would have it impose on New York's already unfairly burdened taxpayers an even greater load. The federal statute could not be read to impose the additional responsibility on enlightened states such as New York to retain and compound the generous benefits paid, while at the same time effectively freezing the less than generous amounts paid by citizens of other states to the needy.

The interpretation of § 602(a) 23 sought by the petitioners involves an unreasonable call for the exercise of the power of judicial review of state action in the area of welfare benefits. It is an effort by petitioners to have this Court implant social philosophy, not of the legislative branch, but of petitioners and more particularly their social advocates. Such judicial legislation was expressly condemned in a well reasoned opinion by Judge Frankel for a three-judge court in *Snell* v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), affd. 393 U. S. 323. The welfare policy sought to be enacted by plaintiffs in that case was of a far more limited sort than that sought here, yet that three-judge court restrained itself in deference to the legislative branch:

> "The plain flaw that nonetheless destroys plaintiffs' thesis is that it is brought to the wrong forum. Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.
>
> Against plaintiffs' views, as defendants point out, there are arguments of policy which can scarcely be

> dismissed as frivolous, whether or not we would find them convincing if the judgment of policy were for us. * * *
>
> It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: 'The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.' Lochner v. State of New York, 198 U. S. 45, 75, 25 S. Ct. 539, 546, 49 L. Ed. 937 (1905) (dissenting). Now that his dissenting thought has won the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so. * * *
>
> The principle counsels that it is not for federal judges to be 'liberal' or 'conservative' in advancing and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality." (*Id.* at 862, 863.)

The petitioner's contentions (and the District Judge's order) mandated the payment of the additional tax monies by New York although, as this Court pointed out in *King* v. *Smith, supra,* relied upon by petitioner, the effect of non-compliance—the withdrawal of federal funds—would be a matter to be pursued by the federal agency.

Moreover, the essential fact in *King* was that the regulation under challenge was part of a state plan approved by HEW. Thus, resort to that agency would be idle and accordingly the majority of this Court affirmed the issuance of the declaratory judgment, leaving it up to the

state officials to choose between having the right to receive federal funds and retaining their regulation.

Here, not only has HEW not passed upon the conformity of New York's statute to the Social Security Act, which question is initially committed to its administration, but it was not made a party to the litigation (although respondents moved to add HEW as a necessary party) and, as we have pointed out, that the injunction issued by the District Judge permitted no flexibility to the state.

Indeed, the fact that the validity of this statute is not properly before this Court required dismissal of this action since plaintiffs have failed to join a responsible official of HEW. New York's eligibility for federal aid is the only proper issue raised by the alleged conflict between § 602(a)(23) and § 131-a. Thus, without a responsible federal official, "a final decree cannot be rendered between the other parties • • • without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." *Turner* v. *Brookshear*, 271 F. 2d 761, 764 (10th Cir. 1959); see Fed. R. Civ. Pro. 19(a)(1). The Judge denied defendants' motion to join the Federal Government. But an order depriving New York of federal funds would have to run principally against HEW and only secondarily against the New York officials.

Motion to Expedite

If this Court grants certiorari, respondents take no formal position on the motion to expedite. Nonetheless, the severe time limitations on respondents up until now have prevented us from doing the depth of research warranted by this case. Respondents request, at the very least, 30 days to prepare their brief after petitioners have filed theirs. Furthermore, respondents also request that this case be heard on a printed record since the issues are so complex and the exhibits so important.

CONCLUSION

For the foregoing reasons the instant petition for a writ of certiorari should be denied.

Dated: New York, New York, October 1, 1969.

Respectfully submitted,

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